

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN R. KARR

Claimant

V.

MID CENTRAL CONTRACTORS

Respondent

AND

EMPLOYERS MUTUAL CASUALTY CO.

Insurance Carrier

Docket No. 1,061,671

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 9, 2015, Order entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on November 17, 2015. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Ryan Weltz of Overland Park, Kansas, appeared for respondent.

The ALJ found Mr. Phalen entitled to attorney fees in the amount of \$3,207.28.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 6, 2015, Motion for Attorney Fees Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Mr. Weltz argues the ALJ's Order should be vacated because Mr. Phalen is not entitled to attorney fees until the parties have completely exhausted their various rights of appeal. Mr. Weltz argues there is no statutory authority allowing the ALJ to order respondent to pay attorney fees for work undertaken before the ultimate disposition of the original claim.

Mr. Phalen contends the ALJ's Order should be affirmed. Mr. Phalen argues there is no restrictive provision in K.S.A. 44-536(g) to prohibit the award of attorney fees for services rendered before the Board of Appeals. Moreover, "[t]he legal services rendered

by this office for the Claimant in this matter clearly fit within the 'otherwise' category for attorney fees purposes."¹

The issues for the Board's review are:

1. Did the ALJ exceed his jurisdiction by entering post-award attorney fees, pursuant to K.S.A. 44-536, for fees incurred by claimant in conjunction with appeal proceedings before the Board?
2. Does K.S.A. 44-536 allow the ALJ to assess post-award attorney fees before the ultimate disposition of the original claim; i.e., when the original claim for compensation is still pending before the Kansas Court of Appeals?
3. Does the ALJ's Order represent an abuse of discretion?

FINDINGS OF FACT

This matter was originally before the Board on respondent's appeal of the October 29, 2014, Award of ALJ Brad E. Avery. In its Order of April 17, 2015, the Board modified the ALJ's Award to reflect a 51 percent work disability from November 11, 2013, through November 29, 2013, and a 52 percent work disability thereafter. Respondent then appealed to the Kansas Court of Appeals on May 12, 2015. A hearing before the Court of Appeals was scheduled to be heard on the summary calendar on November 18, 2015.

A hearing on claimant's motion for attorney fees was held before the ALJ on July 6, 2015. Mr. Weltz argued the work Mr. Phalen performed defending the original Award before the Board was part of earning the original fee, and K.S.A. 44-536 requires that there be subsequent proceedings to the ultimate disposition of the case. The ALJ replied:

THE COURT: I know I didn't do it in a timely fashion, but your position is [Phalen] is not entitled to a defense, for the hours for defending the award, correct?

MR. WELTZ: True, Judge, I don't think there's any basis for him to earn an hourly fee until we have decided what the, what his contingency fee is going to be, for the disability that he ends up proving.

THE COURT: Well, there is case law to the contrary but I will put that in the order. Okay, the Court then will award the Claimant's attorney Mr. Phalen \$3,270.25 pursuant to what has been marked as Exhibit 1 and I will get an [order] to that effect to you shortly.²

¹ Claimant's Brief (filed Sept. 14, 2015) at 2.

² M.H. Trans. at 5.

The ALJ did not cite case law in his order. Respondent timely appealed.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-536 states, in part:

(a) With respect to any and all proceedings in connection with any initial or original claim for compensation, no claim of any attorney for services rendered in connection with the securing of compensation for an employee . . . shall exceed a reasonable amount for such services or 25% of the amount of compensation recovered and paid, whichever is less, in addition to actual expenses incurred, and subject to the other provisions of this section. . . .

(b) All attorney fees in connection with the initial or original claim for compensation shall be fixed pursuant to a written contract between the attorney and the employee or the employee's dependents

. . .

(g) In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis.

"The right to attorney's fees . . . is wholly dependent on the provisions of the compensation acts, and fees are allowable only in such proceedings and in such circumstances as the statutes permit."³ "Statutory attorney fee awards serve to deter potential violators and encourage voluntary compliance with the statute involved."⁴

A plain and unambiguous workers compensation statute should be interpreted based on its express language without speculation on legislative intent or judicial modification.⁵

³ *Hernandez v. State*, No. 107,745, 2012 WL 4937630 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012), *rev. denied* 297 Kan. ____ (2013).

⁴ *May v. University of Kansas*, 25 Kan. App. 2d 66, 70, 957 P.2d 1117 (1998).

⁵ See *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

K.S.A. 2013 Supp. 44-551(l)(1) states:

Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a, and amendments thereto, made by an administrative law judge shall be subject to review by the workers compensation appeals board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556, and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

ANALYSIS

Mr. Phalen is seeking attorney fees for work performed defending an appeal to the Board by respondent of ALJ Avery's May 5, 2014, Award. K.S.A. 44-536(g) allows attorney fees for work performed subsequent to the ultimate disposition of the initial and original claim. The Board has held that an ALJ's award is not the ultimate disposition of the initial and original claim.⁶ Mr. Phalen is not entitled to attorney fees for services incurred defending respondent's appeal of ALJ Avery's May 5, 2014, Award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated July 9, 2015, is reversed.

IT IS SO ORDERED.

⁶ See *Rogers v. ALT-A&M JV LLC*, No. 1,053,980, 2015 WL 5462023 (Kan. WCAB Aug. 19, 2015). This case is currently on appeal to the Kansas Court of Appeals, No. 114,446.

Dated this _____ day of December, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Hon. Steven M. Roth, Administrative Law Judge